

U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036



DATE: MAY 1, 1989
CASE NO. 88-INA-373

IN THE MATTER OF

U.S.A. MANUFACTURING, INC.
Employer

on behalf of

SALIM HABEEB ABIYAGHI
Alien

Appearance: David S. Glassman, Esquire
For the Employer

BEFORE: Litt, Chief Judge; and Brenner, Guill,
Tureck, and Williams
Administrative Law Judges

LAWRENCE BRENNER
Administrative Law Judge

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) ("the Act").

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF") and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

The Employer, U.S.A. Manufacturing, Inc., filed an application for labor certification on behalf of the Alien, Salim Habeeb Abiyaghi, for the position of Export Manager on July 28, 1987 (AF 26,83). The job duties were described as follows:

Will be export manager for the Middle East and Africa to sell and promote our products and increase potential support to our company. Will be traveling frequently between the United States and the Middle East and will be in charge of all export documents such as letters of credit, shipping and insurance matters, freight and customs clearance.

The Employer listed the minimum job requirements as four years of high school education, and three years of experience in the job offered.

In his February 23, 1988 Notice of Findings (AF 30-32, 77-79), the Certifying Officer (C.O.) denied the Employer's application for labor certification. In pertinent part, the C.O. found that this does not appear to be a bona fide job offer open to qualified available U.S. workers, as required by section 656.20(c)(8). In so finding, the C.O. noted that the Employer failed to submit clear documentation that U.S. applicants were rejected solely for lawful job-related reasons. See 20 C.F.R. §656.21(b)(7). Furthermore, Employer failed to comply with section 656.21(j) regarding a detailed written report of the results of its post-application recruitment efforts. The C.O. noted that instead of explaining "with specificity, the lawful job-related reasons for rejecting each U.S. worker who applied" (emphasis in original), the Employer simply stated, in a November 2, 1987 letter (AF 93): "I have reviewed these (seventeen) resumes and do not feel that any of these applicants qualify for the position that we have available."

In its Rebuttal, dated March 17, 1988 (AF 24-25), the Employer gave reasons for its rejection of the U.S. applicants. In addition, the Employer noted that "none of the above applicants had any experience in heating, air-conditioning or refrigeration. It is imperative that the person for this position be experienced in exporting our products which are heating, air-conditioning and refrigeration parts and equipment."

The C.O., in his May 6, 1988 Final Determination denied the application for labor certification, citing the Employer's improper and undocumented rejection of two qualified U.S. workers, namely, Marcelina Connelly-Rigney and Warren G. Edwards, for other than lawful job-related reasons (AF 13-15). The Employer requested review of this denial (AF 1-12).

Discussion

As set forth above, the Employer initially provided no rationale whatsoever for its rejection of seventeen U.S. applicants other than the bald assertion by its President that none of the applicants qualify (AF 93).

In response to the C.O.'s Notice of Findings, in which he requested greater specificity, the Employer provided the following "explanation" for the rejection of the two U.S. applicants cited in the Final Determination: Marcelinda Connelly-Rigney -- "No import/export experience, only clerical." Warren G. Edwards -- "Documentation clerk exp." We find that these cursory notations do not meet the "specificity" requirement of section 656.21(j)(1)(iv). As stated above, the Employer also stated that none of the U.S. applicants had experience in heating, air-conditioning or refrigeration; and that such experience was "imperative" (AF 24-25).

Regarding the latter statement by Employer, we note that there is no indication in the job duties or requirements (boxes 13, 14 and 15 of the application form 750 A) that experience is needed in heating, air-conditioning or refrigeration products (AF 16,83).¹ Furthermore, neither the job order (AF 88), the advertisements (AF 89-91), nor the job notice (AF 92) mention the type of products being marketed. To be sure, merely including a requirement in the advertisement would not have served to legitimize it if the requirement is not specified in the application. However, when a claimed requirement was not made known to prospective applicants as part of the recruitment, this fact severely undercuts the Employer's argument that it really is a requirement. In addition, we note that, coincidentally, Mr. Edwards does have experience with those products, in his duties with The Elliott-Williams Co., Inc., a manufacturer of walk-in coolers, freezers, environmental chambers, and refrigerated warehouses (AF 9).

In analyzing the primary rationale for the Employer's rejection of Mr. Edwards, we find its explanations on rebuttal not only cursory, but gross mischaracterizations of his actual work experience. Similarly, the Employer's summary of the U.S. worker's experience in its Appeal (AF 2-5) is incomplete and inaccurate.

Assuming arguendo that Ms. Connelly-Rigney's experience does not meet the requirements of the job offered, an Export Manager, it is clear that Mr. Edwards' experience does so.

The Employer, in its rebuttal, rejected Mr. Edwards because "Documentation clerk exp." (AF 24-25). In its request for review, the Employer stated:

¹ Box 8, "Nature of Employer's Business Activity", does state "Expert [sic-Export] and International Master Distributor for A/C & Heating Products"; and the job duties listed in box 13 state that the job requires selling and promoting "our products." But these oblique references are insufficient to establish that the certification application required experience with heating and air-conditioning.

Mr. Edwards has experience in the sale and marketing as a consolidator for freight. The product which he sells is a service, namely consolidation of freight for shipment overseas. It is not the sale of a product such as our company partakes. In fact, if you will note his experience for the Elliot-Williams Co., Inc., he specifically states that he "administered all phases of export activity except sales." The rest of his experience is not related to the job being offered as it includes being an auditor, supervisor of a manufacturer and a station manager for a sea and air service company. This experience is in no way related to the job being offered.

(AF 2-5).

We find that Employer's rebuttal and summary on request for review are inadequate and grossly inaccurate. Mr. Edwards' 3 1/2-page resume (AF 9-12) reveals some thirty years of relevant work experience, in various capacities. More significantly, since 1960, Mr. Edwards has worked as "Manager of Purchasing, Production Control and Export Manager; Partner and Chief Operating Officer; Owner of an Export-Import management company; Station Manager, International Freight Forwarder; Partner and Director of an Export Management Company; Export/Operations Traffic Manager with additional duties as Government Services Manager and Parts Manager; Manager, Sales & Marketing, Foreign Freight Forwarder; and Regional Marketing Manager. As owner of his own export-import management company from January 1974 to December 1978, Mr. Edwards acted as an export-import management consultant and broker for small firms. This included trading of industrial equipment and food products in domestic and foreign markets, including the Middle East and Africa, the same markets specified by the Employer in this case (AF 10).

The Employer noted that Mr. Edwards specifically had stated in his experience for the Elliott-Williams Co., Inc., that he "administered all phases of export activity except sales." The Employer failed to note, however, that Mr. Edwards' additional duties included sales to government agencies, as well as administration of spare part sales. Furthermore, as Sales & Marketing Manager for Sea Express International, Inc. and as Regional Marketing Manager for Econocaribe Consolidations, Inc., Mr. Edwards has been responsible for all sales and marketing functions. Finally, even though it is not listed among the duties and requirements for the job offered, we again note that Mr. Edwards has experience with air-conditioning/heating products.

In view of the foregoing, we agree with the C.O.'s Final Determination. We find that the Employer has failed to meet its burden of establishing that Mr. Edwards was rejected for lawful job-related reasons. See 20 C.F.R. §§656.20(c)(8); 656.21(b)(7); 656.21(j). As set forth above, the Employer rejected an available U.S. worker, Mr. Edwards whose resume clearly shows that he met the requirement of three years of experience in the job offered, as stated in the application form ETA 750A and in the advertisements for employees. See Quality Products of America, Inc., 87-INA-703 (January 21, 1989 (en banc)).

ORDER

The Final Determination of the Certifying Officer denying certification is AFFIRMED.

For the Board:

LAWRENCE BRENNER
Administrative Law Judge

LB/MP/gaf